IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 838

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

WILLIAM E. McCARTHY, Administrator of the Estate of John J. McCarthy, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, The Pennsylvania Railroad Company, respectfully prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Seventh Circuit to review the final judgment entered in the above entitled case reversing the judgment for defendant-petitioner entered by the United States District Court for the Northern District of Indiana on the verdict of the jury.

Opinion Below.

The opinion of the United States Circuit Court of Appeals, by Circuit Judge Minton, Circuit Judge Major con-

curring (R. 141-148), and the dissenting opinion of Circuit Judge Sparks (R. 148-155) are reported in 156 Fed. (2nd). 877.

Jurisdiction.

The judgment sought to be reviewed was entered August 7, 1946 (R. 155), and the petition for rehearing was denied September 6, 1946 (R. 156). This Court, by order dated November 13, 1946, extended the time for filing the petition for writ of *certiorari* to and including January 4, 1947.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. 28 U.S. Code, Sec. 347, 43 U.S. Stat. 938.

Statutes Involved.

This action was brought under the Safety Appliance Act (45 U.S. Code, Sec. 23, 36 U.S. Stat. 913) and the Federal Employers' Liability Act. 45 U.S. Code, Sec. 51, 35 U.S. Stat. 65.

Section 23 of the Safety Appliance Act (Boiler Inspection Act) reads, in pertinent part, as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive * * * and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb * * *."

Section 51 of the Employers' Liability Act reads, in pertinent part, as follows:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or,

in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, * * * or other equipment."

Questions Presented.

1. May the Court determine as a matter of law whether an alleged violation of the Safety Appliance Act was or was not a proximate cause contributing to the employee's injury or death, thereby depriving either of the parties of the right to a jury determination of that issue of fact?

2. Does the Employers' Liability Act, eliminating the defenses of contributory negligence and assumption of risk, where there is a Safety Appliance Act violation, deprive the employer of the defense that the employee's own misconduct was the sole proximate cause of his injury or death?

3. May an employee or his personal representative recover under the Employers' Liability Act for injuries or death of such employee caused solely by his own misconduct, while in charge of a locomotive, in willfully disregarding eight separate warnings of a defect in the locomotive and twice refusing to take it out of service?

4. May an appellate court, upon a mere showing that there was a violation of the Safety Appliance Act, without any direct evidence that the accident resulted from such violation, hold as a matter of law that such violation was a proximate cause contributing to the accident and thereby deprive the employer of a jury trial on that question?

5. Are the Safety Appliance Act and the Employers'

Liability Act to be construed together as a workmen's compensation act, relieving the employee or his personal representative from the burden of proving causation and making the employer an insurer of the safety of its employees?

Reasons for Granting the Writ.

1. The United States Circuit Court of Appeals for the Seventh Circuit, in holding as a matter of law, that an alleged violation of the Safety Appliance Act was a proximate cause of the death of the employee, and that the alleged misconduct of such employee was not the sole proximate cause of his death, after a jury had found both of such facts to the contrary, has decided an important question of Federal law in conflict with the decisions of this Court and of other United States courts of appeals, including especially the following:

Lavender v. *Kurn*, 327 U.S. 645;
Blair v. *B. & O. R. Co.*, 323 U.S. 600;
Tennant v. *P. & P. U. Ry. Co.*, 321 U.S. 29;
Brady v. *Southern Ry. Co.*, 320 U.S. 476;
Bailey v. *Central Vermont Ry. Inc.*, 319 U.S. 350;
Lilly v. *Grand Trunk R. Co.*, 317 U.S. 481;
B. & M. R. Co. v. *Cabana*, (C.C.A. 1) 148 Fed. (2nd) 150;
Barry v. *Reading Co.*, (C.C.A. 3) 147 Fed. (2nd) 129;
Pratt v. *L. & A. Ry. Co.*, (C.C.A. 5) 135 Fed. (2nd) 692;
McGivern v. *N. P. Ry. Co.*, (C.C.A. 8) 132 Fed. (2nd) 213;
Edwards v. *B. & O. R. Co.*, (C.C.A. 7) 131 Fed. (2nd) 366.

2. The United States Circuit Court of Appeals for the Seventh Circuit has held, in effect, that the Employers' Liability Act and the Safety Appliance Act are to be construed together as a workmen's compensation act, eliminating negligence of the carrier as an element of liability and making carriers insurers of the safety of their employees, in conflict with the decisions of this Court and of other United States courts of appeals, including especially the following:

Bailey v. *Central Vermont Ry. Inc.*, 319 U.S. 350;
Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54;
Mastrandrea v. *Pennsylvania R. Co.*, (C.C.A. 3) 132 Fed. (2nd) 318;
Edwards v. *B. & O. R. Co.*, (C.C.A. 7) 131 Fed. (2nd) 366.

3. It is a matter of great public importance, particularly to all carriers by railroad and all employees of such carriers and their next of kin, that a uniform construction be given to the Safety Appliance Act and the Employers' Liability Act, and the public interest will be served by a definitive decision of this Court with respect to the issues reserved for jury determination by said Acts and the finality of jury verdicts embracing decisions upon such issues.

Summary Statement of the Case.

Respondent, William E. McCarthy, administrator of the Estate of John J. McCarthy, deceased, plaintiff-respondent, brought this action in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, under the Safety Appliance Act and the Employers' Liability Act, to recover damages for the death of plaintiff's decedent, a railroad engineer, resulting from in-

juries received by decedent while operating one of petitioner's passenger trains between Valparaiso, Indiana, and Chicago, Illinois (R. 1-3). Defendant-petitioner denies negligence and unlawful conduct and that any wrongful act by it was a proximate cause of the death, and avers that the accident was the result solely of the misconduct of decedent (R. 3-6).

The pertinent facts, adduced from many witnesses, showed that a locomotive in good condition was furnished decedent at Valparaiso (R. 46, 52, 102, 108), that during the run a hot box developed on the pony truck of the locomotive (R. 15, 84, 94), that on eight occasions decedent was warned of the hot box and acknowledged the existence thereof (R. 16, 84, 94, 96, 99, 109, 110, 113), that decedent twice refused the suggestion of the conductor to get another locomotive to complete the run, signaling that the locomotive was OK to go (R. 22, 24, 31-34), and that shortly before the train arrived at its destination in Chicago the locomotive left the track and turned over, for cause not directly disclosed by the evidence, resulting in decedent's death (R. 210, 56).

At the conclusion of the trial, which consumed three days, the jury, following full instructions from the Court (R. 119-127), returned a general verdict in favor of defendant-petitioner (R. 7). Plaintiff-respondent's motion for a new trial was overruled (R. 9) and judgment was entered in favor of defendant-petitioner (R. 10). Thereupon appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit (R. 10). The Circuit Court of Appeals by a divided vote reversed the judgment below and directed the District Court to grant a new trial (R. 155).

Specification of Errors.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding as a matter of law that the alleged violation of the Safety Appliance Act was a proximate cause of the death of decedent, thereby substituting its opinion on the evidence for the contrary determination of the jury.

2. In holding as a matter of law that decedent's own misconduct was not the sole proximate cause of his death, when, after specific instructions from the Court on the question, the jury had determined from all of the evidence that such misconduct was the sole proximate cause of his death.

3. In holding that the Safety Appliance Act and the Employers' Liability Act, considered in *pari materia*, are to be judicially construed as a workmen's compensation act, relieving the employee or his personal representative from the burden of proving proximate cause between a violation of the Safety Appliance Act and the injury or death of the employee, thereby making the employer an insurer of the safety of its employees.

Summary of Argument.

The Court of Appeals has withdrawn from the function of the jury the determination of the fact questions whether the carrier was negligent and whether that negligence, if any, was a proximate cause of the injury. The undisputed evidence is that the locomotive was in good order when it was delivered to decedent, that a hot box developed after

he had driven it twenty-three miles, that he was fully aware of its defective condition, that he was in complete control, that the conductor sought to persuade him to take the defective locomotive out of service, and that decedent wilfully and defiantly continued to use the defective locomotive after its condition was fully disclosed to him. There is no direct evidence as to the cause of the derailment which resulted in decedent's death. The jury, by its general verdict for defendant, found that the accident did not result from any act of commission or omission of defendant but that it resulted solely from the misconduct of decedent. Under these circumstances it was an undue invasion of the jury's historical function for the Court of Appeals to weigh the evidence and arrive at a conclusion opposite from the one reached by the jury.

The jury was fully and accurately instructed by the District Court. The Court of Appeals, considering isolated statements in the instructions and holding that defendant's liability is established by mere proof of the presence of the defect in the locomotive, reversed on the ground that the District Court left to the jury for determination the question whether the misconduct of decedent in keeping the defective locomotive in service was the sole proximate cause of the accident which resulted in his death. This was a question of fact and it was the jury's function to determine it. The Court of Appeals erred in abdicating its duty to protect the right of defendant to a jury determination of that question and in taking from defendant the benefit of the jury's verdict.

There is abundant evidence that the accident was caused by the wilful misconduct of decedent, independent of any acts of defendant, and the Court of Appeals erred in holding that there is no evidence to which the District Court's

instruction submitting this question to the jury relates. Following the reasoning of the Court of Appeals, an engineer could deliberately run his locomotive into a river after a washout and commit suicide, and the railroad would be liable to his personal representative because it did not maintain a safe track.

The construction by the Court of Appeals of the Safety Appliance Act and the Employers' Liability Act, as a workmen's compensation act, is contradictory of the language of the Acts. By their very terms the Acts make negligence the basis of liability and it is elementary that there is no liability, even where there is negligence, unless the negligence is the proximate cause of the injury.

The Court of Appeals has in this case rendered a decision in conflict with the applicable decisions of this Court and with the decisions of other courts of appeals, and it has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

ARGUMENT.

I.

The Circuit Court of Appeals, by substituting its judgment for that of the jury on the question of negligence of the defendant and the proximate cause of the accident, has denied the defendant its constitutional right to trial by jury and its only defenses under the statute.

The Court of Appeals has held in effect that liability under the Safety Appliance Act and the Employers' Liability Act is absolute and that the carrier is an insurer of the safety of its employees. It has withdrawn from the function of the jury the determination of the questions whether the carrier was negligent and whether that negligence was a proximate cause of the injury.

The Court of Appeals states the acts of negligence charged (R. 142-143), and then concludes that all of the charges have been "proven without question" (R. 143). The jury, by its verdict for defendant, under instructions of the District Court fully and accurately stating the issues and the rights and duties of the parties under the law, found from the evidence that defendant did not negligently permit a defective locomotive to be placed in service, did not negligently permit a defective locomotive to be used in service, and did not order the locomotive here involved to be operated after it became known that it was defective. The Court of Appeals, by its conclusions of fact, has substituted its judgment for that of the jury and has denied the defendant its constitutional right to a trial by jury.

There is no evidence that the locomotive here involved was defective when it was placed in service at Valparaiso, Indiana. The undisputed evidence is that it was then in

good order (R. 52). It was first discovered that a hot box had developed on the right side of the pony truck of the locomotive at Indiana Harbor (R. 15), twenty-three miles from Valparaiso (R. 28). Decedent was in charge of the locomotive (R. 23), knew by personal inspection of its condition (R. 21, 84, 110), and was the employee on the train qualified by training and experience to know whether it was safe to proceed. Notwithstanding repeated warnings (R. 16, 84, 94, 96, 99, 109, 110, 113) and against the specific suggestions of the conductor (R. 22, 24), decedent proceeded to use the locomotive until the accident which resulted in his death occurred (R. 20). The undisputed evidence is, as the jury found, that defendant did not order decedent to use the locomotive after the hot box developed, but that decedent defiantly disregarded the repeated warnings of others of the condition and the suggestions of the conductor that he take the locomotive out of service. Whether defendant was guilty of negligence which contributed in any degree to the accident which resulted in decedent's death was an issue of fact for determination by the jury.

There is abundant evidence to support the verdict of the jury. In fact, there is substantially no conflict in the testimony of witnesses. The only reasonable deduction from the evidence is that represented in the verdict of the jury. There is no direct evidence supporting the factual conclusions of the Court of Appeals, contrary to the findings of the jury, that "the pony truck broke down because of the hot box" (R. 142), or that the negligence of the defendant, inferred from the presence of the hot box, "continued up to the scene" of the accident, and "was in fact a contributing cause of the accident" (R. 145). These inferences drawn from the evidence by the Court could have been drawn by the jury, as the instructions

clearly invited, but the jury refused to draw these inferences. The jurors, who saw and heard the witnesses, reached the conclusion that defendant was not negligent and that no act of commission or omission of defendant contributed in any degree to cause the accident. The trial Judge, who saw and heard the witnesses, approved this conclusion of fact.

We assume it will be conceded that principles of law should be applied equally to plaintiffs and defendants. Most of the cases, where the courts have held steadfastly to the rule that it is the province of the jury to determine fact issues and have refused to substitute their judgment for that of the jury on questions of fact, have been those where the verdict was for the plaintiff. But the sanctity of trial by jury will not be preserved if the same rule is not applied where the verdict is for the defendant. Paraphrasing the language of this Court in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 354: To deprive the carrier of the benefit of a jury trial under the Employers' Liability Act in close or doubtful cases is to take away from it the only protection left to it by Congress.

A late decision of this Court dealing squarely with this question is in *Lavender* v. *Kurn*, 327 U. S. 645. In that case a switchman was killed in the yards at night and there was no direct evidence as to how he was killed. Plaintiff's theory was that decedent was struck by a mail hook on the mail car of the backing train, but there was evidence tending to show that it was physically impossible for the hook to strike him. There was also evidence from which it might reasonably be inferred that decedent was murdered. There was a verdict and judgment for plaintiff, but the Supreme Court of Missouri reversed on the ground that there was no substantial evidence of negligence to support submission of the case to the jury. This

Court held that this was an invasion of the province of the jury, pointing out that there was a reasonable basis for inferring that the mail hook struck decedent and that the jury, having made that inference, the defendant could not relitigate the factual dispute in a reviewing court. This Court said (p. 652-653):

> "Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. [Authorities.]
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The jury in the case at bar was free to conclude from the evidence that the actual derailment of the locomotive resulted from causes other than the negligence of defendant in putting a defective locomotive in service or in continuing it in service after it became defective and in concluding decedent's own willful misconduct in the operation of the locomotive caused it to leave the tracks. The evidence is undisputed that decedent ignored the repeated

warnings about the hot box and twice refused to follow the suggestion of the conductor that he get another locomotive. There is no direct evidence of the cause of the derailment, but it does not follow, as the Court of Appeals apparently assumes, that the jury was limited by law to reaching the conclusion that the derailment was caused by the negligence of the defendant in putting and keeping a defective locomotive in service, and that it was not caused solely by the defiant misconduct of decedent in keeping in service the defective locomotive after he was fully informed of its condition. The only possible explanation of the conclusion reached by the Court of Appeals is that it concluded that its inference that defendant's negligence was a contributing cause of the accident was more reasonable than the jury's inference that it was not. This is precisely what this Court has said is an unwarranted invasion by an appellate court of the exclusive province of the jury. Certainly the rule has identical application, whether the inferences adopted by the jury are favorable to the plaintiff or to the defendant, and the general verdict of the jury for the defendant is entitled to the same weight and the same sanctity, as declared by this Court for a verdict for the plaintiff.

Another recent case dealing squarely with the point is *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350. There the decedent, a section man, fell from a railroad bridge and was killed. The question was whether defendant was negligent in failing to use reasonable care in furnishing decedent with a safe place to work. There was a verdict for plaintiff and the Supreme Court of Vermont reversed it because there was no proof of negligence by defendant. After pointing out that the issue was one of fact, this Court said, in reversing the State court (pp. 353-354):

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions.
>
> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In considering the general verdict of the jury for the defendant in the case at bar, all facts and inferences to be drawn therefrom should be weighed in the light most favorable to the defendant. The Court of Appeals, however, has adopted the inferences most favorable to the plaintiff in substituting its judgment for that of the jury. Its decision in the case at bar is in direct conflict with its decision in *Edwards* v. *B. & O. R. Co.*, 131 Fed. (2nd) 366, where the Court held, Circuit Judges Major and Minton concurring, that no recovery may be had where negligence on the part of the carrier or one of its employees is not proven, and also that where uncertainty as to negligence arises from the evidence the question is one of fact for the jury and not one of law for the court.

The decision here sought to be reviewed is in direct conflict with the decisions of this Court and decisions of other courts of appeals which support the right to trial by jury as a basic and fundamental feature of our system

of jurisprudence and which hold that under the Safety Appliance Act and the Employers' Liability Act there is still open for jury determination the question of negligence of the carrier and of proximate cause of the injury.

Blair v. *B. & O. R. Co.*, 323 U. S. 600, 602;
Tennant v. *P. & P. U. Ry. Co.*, 321 U. S. 29, 35;
Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481, 491;
Barry v. *Reading Co.*, (C. C. A. 3) 147 Fed. (2nd) 129, 130;
Pratt v. *L. & A. Ry. Co.*, (C. C. A. 5) 135 Fed. (2nd) 692, 693.

The decision of the Court of Appeals creates confusion in the law. The senior Circuit Judge sitting on the Court and the District Judge who tried the case disagreed with the two Circuit Judges who concurred in the opinion and gave due recognition to the jury's determination of the fact issues. The public interest will be served by a definitive decision of this Court with respect to the issues reserved for jury determination in cases of this character and the finality of jury verdicts embracing decisions upon such issues.

II.

The District Court, by full and accurate instructions, submitted to the jury the issue of fact whether the defendant negligently put into service a defective locomotive and permitted or ordered the locomotive to continue in service after it became defective. The Court of Appeals erred in lifting from the context of these instructions a few isolated sentences and in holding that there was error in the instructions.

The Court of Appeals uses alleged errors in the instructions as the springboard from which it launches its new philosophy that mere proof of an accident on a railroad

establishes liability for injuries ensuing. It holds that if a defect in a locomotive develops anywhere on a trip and an accident occurs, there is no question of fact open for jury determination of whether the defendant was negligent in putting or keeping the locomotive in service or whether such negligence of the defendant was a proximate cause of the injury. It has ruled as a matter of law that the mere fact that a hot box developed on the locomotive here involved and that the locomotive later left the track and turned over is conclusive of the liability of defendant, and that the District Court erred in leaving to the jury the question whether the presence of the hot box caused the derailment and whether there was any independent willful act of decedent which was the sole proximate cause of the accident.

There is no question of contributory negligence or assumption of risk involved in this case. These defenses are withdrawn from the carrier by the Act. The discussion by the Court of Appeals of defenses not presented indicates its confusion as to the real issue in this case. Defendant contends that decedent's death resulted directly and independently from his own willful disregard of his duty to his employer, his fellow workmen, the passengers on his train, and to the public. Congress has not said, as the Court of Appeals holds (R. 145), that an engineer can willfully and recklessly continue to use a locomotive which has become defective while under his control and which he knows is defective and then hold the carrier liable for the consequences of his own misconduct. This Court has held that the contrary is the law (*C. & O. Ry. Co.* v. *Nixon*, 271 U. S. 218, 219; *Railroad Co.* v. *Jones*, 95 U. S. 439, 442), as have other courts of appeals. *McGivern* v. *N. P. Ry. Co.*, (C. C. A. 8) 132 Fed. (2nd) 213, 219.

The Court of Appeals lifts out of the body of the Dis-

trict Court's instructions a summary of the Employers' Liability Act (R. 145-146) and then finds that the instructions were faulty because the District Court did not instruct the jury that furnishing decedent with a defective locomotive was negligence *per se* (R. 146). The Court ignores parts of the instructions which must be read with the part criticized. The District Court further instructed the jury as follows:

> "The law of the United States provides it is unlawful for a railroad to use or permit the use of any locomotive, unless said locomotive is in proper condition and fit to operate in the service to which it is put, so that such locomotive may be employed without peril to life or limb. This law was in effect at the time John J. McCarthy met his death. In other words, you are instructed that the Pennsylvania Railroad was bound to furnish Mr. McCarthy an engine safe to operate in the service to which it was assigned." (R. 122-123.)
>
> "If you find that the defendant, contrary to law, used or permitted to be used, an engine not in proper condition and unsafe to operate in the service in which it was used, so that it could not be employed without unnecessary peril to life and limb, then, in that event, the defendant can not defend on the ground that the deceased engineer died because of acts on his part contributing to his own death; neither can it defend in that event on the ground that he assumed the risks of his employment,—that is, that he assumed the risks and hazards of his employment after such defects became known to him." (R. 124.)

After stating in its instructions that plaintiff could not recover if decedent's death was caused solely by his own acts independently of any negligence on the part of the defendant, the District Court said:

> "But, as I have stated, if such acts of negligence on the part of the plaintiff, if you find such acts of

negligence, merely contributed to and were not the sole cause of his death, you should find for the plaintiff." (R. 124.)

Surely, it cannot be successfully urged that the instructions did not sufficiently advise the jury that it could infer from the existence of the hot box a violation of the Safety Appliance Act which contributed to the accident which resulted in decedent's death. As this Court said in *Seaboard Air Line Ry. Co.* v. *Padgett*, 236 U. S. 668, 672:

> "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

Ignoring the finding of the jury to the contrary, the Court of Appeals finds:

> "So we have a case where the negligence of the defendant, which was a violation of the statute, continued up to the scene of the accident, and was in part a contributing cause to the accident, * * *. Thus there never was a time from Indiana Harbor, Indiana, to the scene of the accident that the defendant was not negligent, * * *, and his [decedent's] acts were at all times concurring with the defendant's violation of the statute to produce the accident." (R. 145.)

Thus the Court finds as a matter of law that the mere presence of the hot box on the pony truck of the locomotive was negligence on the part of the defendant which caused the accident. This finding is not only unsupported by direct proof but it is directly contrary to the finding of the jury.

Reading the instructions as a whole, there can be no doubt that the jury were told that the employer's failure

to furnish a safe locomotive constituted negligence entitling plaintiff to recover if this negligence contributed in any degree to the accident. In language no jury could misunderstand, the District Court said that however negligent decedent was in failing to take the defective locomotive out of service "if you find such acts of negligence merely contributed to and were not the sole cause of his death, you should find for the plaintiff." There could have been no confusion in the minds of the jury under such instructions and its general verdict for defendant demonstrates its determination from all the evidence that decedent's death was not caused in part by defendant's failure to supply a safe locomotive but was caused solely by his own misconduct.

In *Tennant* v. *P. & P. U. Ry. Co.*, 321 U. S. 29, where there was no direct evidence as to how the employee met his death in the switching yards of the employer, the jury was left to a wide field of inferences as to the cause of death. The verdict for the plaintiff in that case indicated that the jury adopted the inference that the employee's death resulted in part from the absence of an appropriate bell warning. The Court of Appeals for the Seventh Circuit reversed the judgment on this verdict (134 Fed. (2nd) 860), but this Court on further review held that the Court of Appeals was not permitted to search the record for inferences which seemed to it more reasonable than that adopted by the jury and hold therefrom as a matter of law that the failure to ring a bell was not a proximate cause of the employee's death, saying (p. 35):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or

conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [Authorities.] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

What reason is there in the case at bar for the Court of Appeals to abdicate its duty to protect and guard defendant's right to a jury trial? The jury's conclusion that defendant's negligence did not contribute in any degree to the fatal accident is abundantly supported by the evidence and the Court of Appeals was not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because the two concurring Judges felt that other results were more reasonable. If the right to a trial by jury on the question of negligence is to be preserved to defendants as to plaintiffs, then the judgment of the Court of Appeals in this case must be reversed.

Bailey v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 353;

Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481, 491; *Blair* v. *B. & O. R. Co.*, 323 U. S. 600, 602.

Viewed in the light of the test established by appellate courts of every American jurisdiction that instructions must be viewed as a whole and not merely considering isolated parts, a far different test than that applied by the Court of Appeals, we submit that the jury was instructed as follows:

1. The employer is required by Federal law to use fit and safe equipment, and in this case the employer was bound to furnish decedent a fit and safe locomotive (R. 122-123).

2. If it is found from the evidence that an unfit and unsafe locomotive was furnished to decedent, the employer cannot defend on the ground of decedent's contributory negligence or assumption of the risks of his employment (R. 124).

3. If decedent's acts merely contributed to and were not the sole cause of his death and the defendant's acts of omission or commission contributed in any degree to the accident, the plaintiff is entitled to recover (R. 124).

4. If the employer's failure to comply with the law requiring use of locomotives in good condition did not contribute to the cause of decedent's death, but his death was caused solely by his own acts, independently of any negligence of the employer, the plaintiff cannot recover (R. 124).

Perfection in instructing a jury is seldom attained and it is not the province of a court of review to require perfection. When the instructions given to the jury by the District Court in this case are read as a whole, it seems clear that the jury could not have been confused and that it fully understood that plaintiff was entitled to recover

if a violation of the Safety Appliance Act by defendant contributed in any degree to the accident which resulted in decedent's death. As the District Court said to the jury in language no one can misunderstand, defendant was entitled to acquittal only in the event the jury found that decedent's wanton disregard of his own safety and the safety of others in continuing the locomotive in service after he learned that it was defective was the sole and independent cause of his death to which no act of omission or commission by defendant contributed in the least. Paraphrasing the language of this Court in *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 491, under the facts in this case and the applicable law, the jury could rightfully find for defendant, and the benefits of that rightful determination, approved by the District Court, should not have been taken from it.

III.

The evidence shows that decedent's willful misconduct and total disregard of his obligations to his employer, his fellow employees, the passengers on his train, and the public was the sole cause of the accident, and the jury so found. The Court of Appeals erred in holding as a matter of law that decedent's misconduct was not the sole proximate cause of his death.

Again lifting two sentences out of the context of the District Court's instructions and ignoring the second of these sentences (R. 147), the Court of Appeals says:

> "This instruction is improper, first because it told the jury in effect that the defendant's liability for violation of the statute depended upon the said violation being the cause of the decedent's death, whereas the statute provides that the defendant shall be liable if the violation caused 'in whole or in part' the death of the decedent. Secondly, the instruction is improper

> because it told the jury that the plaintiff could not recover if his decedent was guilty of acts of negligence that solely caused his death. As an abstract proposition of law, that is correct, but there was no evidence of any independent acts of negligence by the decedent that were the sole cause of the accident and his death. The court had instructed on a proposition of law about which there was no evidence." (R. 147-148.)

Let us examine the instruction which receives this condemnation by the Court of Appeals and see whether it is subject to any of the criticism leveled at it. The criticized instruction reads:

> "On the other hand, (if you find) that the railroad company knew at all times the things required of it by law, and that it did not violate the law requiring the use of engines in safe condition, even if you find the defendant was negligent and did not comply with the law requiring the use of engines in good condition, but that such failure to comply with the law was not the cause of the injury to and death of the decedent, but that such injury and death were caused solely by his own acts, independently of any negligence on the part of the defendant, it would be your duty to find for the defendant. But, as I have stated, such acts of negligence on the part of the plaintiff, if you find such acts of negligence, merely contributed to and were not the sole cause of his death, you should find for the plaintiff." (R. 124.)

How can it be said that this instruction does not state in unmistakable language "that the defendant shall be liable if the violation caused 'in whole or in part' the death of the decedent"? True, the words "in whole or in part" do not appear in the District Court's instructions, but more meaningful words expressing the same thought do appear. The instructions exclude, as effectively as lan-

guage can make the exclusion, the defense of contributory negligence and assumption of risk and say that the plaintiff must recover if the violation of the Safety Appliance Act by defendant contributed in any degree to the accident.

How the conclusion can be drawn from the record in this case that "there was no evidence of any independent acts of negligence by the decedent that were the sole cause of the accident and his death," is puzzling. The uncontradicted evidence is that decedent had eight independent warnings of the presence of the hot box on the pony truck of the locomotive and that he twice refused the request of the conductor that he discontinue the use of the defective locomotive and get another. These acts of decedent are certainly independent of any acts of defendant and they are willful and definant in their disregard of the rights of the employer and others. To say that the District Court "instructed on a proposition of law about which there was no evidence", when it submitted the question of whether decedent's acts were the sole proximate cause of the injury, is to completely ignore the evidence.

The Court of Appeals, ignoring the finding of the jury to the contrary, finds as a fact that decedent's acts in continuing to use the locomotive after the hot box developed were concurring acts with the act of the defendant in violating the Safety Appliance Act, and were either acts of contributory negligence or assumption of risk, and then quotes from *Spokane & Inland Empire R. Co.* v. *Campbell*, 241 U. S. 497, the proposition that where plaintiff's contributory negligence and defendant's violation of the Safety Appliance Act are concurring proximate causes, the Employers' Liability Act requires the former to be disregarded (R. 146-147). In the *Campbell* case the verdict was for the plaintiff and the language used by this Court was appropriate to the situation in that case. In the case

at bar the jury by its general verdict for defendant found that plaintiff's willful misconduct was the sole proximate cause of the accident and that defendant's alleged violation of the Safety Appliance Act did not contribute in any degree to the cause of the accident. In this situation we submit that the decision in the *Campbell* case is in line with the many decisions of this Court which hold that the question of proximate cause is one of fact and that the verdict of the jury must be sustained if there is evidence to support its finding on the facts. Properly considered, the *Campbell* case is authority against the decision of the Court of Appeals in this case.

Despite the strong invitation of the District Court's instructions, the jury refused to accept the theory that the failure to furnish a safe locomotive was a proximate cause of the derailment resulting in decedent's death and that the acts of the decedent, who was in sole charge of the locomotive at the time, in keeping the locomotive in service, were merely contributory thereto; and the Court of Appeals, in adopting a contrary theory, is substituting its conclusion from the evidence for that of the jury. The only explanation of the finding of error in that portion of the instructions dealing with decedent's own acts as the sole cause of his death is that the Court of Appeals holds as a matter of law that decedent's acts were not the sole cause of his death and withdraws from the jury the issue of proximate cause.

When the Court of Appeals says of the instructions (R. 148),

> "This was bound to confuse and mislead the jury into believing that the concurring acts of the decedent in continuing to use the defective locomotive after he knew it was defective, and not reporting it, might be considered as acts of negligence, for which the

> decedent might be charged with sole liability for the accident",

by indirection it says that an employee owes no duty to his employer and that the employer is the guarantor of the safety of the employee regardless of the employee's misconduct. There is no support in the law for such a holding and we submit that it is contrary to reason and sound policy. At least an employee should have the restraining influence of responsibility for his own defiant disregard of the rights of others.

Compare:

Davis v. *Kennedy*, 266 U. S. 147, 148;
Frese v. *C. B. & Q. R. Co.*, 263 U. S. 1, 3;
Great Northern Ry. v. *Wiles*, 240 U. S. 444, 448.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, in an opinion reviewing at length the amendment to the Employers' Liability Act which withdrew the defense of assumption of risk, this Court holds (p. 67) that the Federal statutes "leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury." Now the Court of Appeals by its decision in the case at bar withdraws these two defenses and leaves nothing to be decided after an injury in the course of employment is proven, except the amount to be paid. In the *Tiller* case, this Court makes it very clear that there is still left open for jury determination the question whether the carrier was negligent, and it says (p. 67) that "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what

such a person under the existing circumstances would not have done."

Can any reasonable person, under the evidence in the case at bar, reach the conclusion that decedent was not guilty of the grossest sort of misconduct in continuing in service the locomotive of which he had sole charge after he discovered its defective condition. And if it can be said that he was guilty of misconduct which could have been the sole cause of his injury, who can say that it is not for the jury to decide whether that misconduct was the independent and sole proximate cause of the accident which resulted in his death.

The Federal courts have held uniformly, as far as we are advised, what common sense dictates, that one who by his own independent misconduct has brought injury upon himself cannot recover damages for it.

C. & O. Ry. Co. v. *Nixon,* 271 U. S. 218, 219;
Railroad Co. v. *Jones,* 95 U. S. 439, 442;
McGivern v. *N. P. Ry. Co.,* (C. C. A. 8) 132 Fed. (2nd) 213, 219.

In *Davis* v. *Kennedy,* 266 U. S. 147, this Court said (p. 148):

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

In *Frese* v. *C. B. & Q. R. Co.,* 263 U. S. 1, this Court said (p. 3):

"Moreover, the statute makes it the personal duty of the engineer postively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, the personal representative of a flagman, who failed to go back to protect the rear of his train when it stopped by the pulling out of a drawbar, was denied recovery, this Court saying (p. 448):

"The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself but to others. * * * How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

"In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

In an early decision of this Court in *M. & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469, this Court defined proximate cause and the function of the court and the jury with respect thereto as follows (pp. 474-476):

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. * * * The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

As this Court said in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484:

"The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Applying these principles, it becomes clear that there is evidence from which the jury could determine, under the full and accurate instructions of the District Court, that the decedent's defiant disregard of his duties was the act, dissevered from any violation of the statute by defendant, which was the proximate cause of the injury,

and that the Court of Appeals, by deciding this question against the defendant as a matter of law, invaded the province of the jury.

Legal causation is broken when an unforseeable act intervenes, and this is particularly true where the alleged breach of duty is but a condition which sets the stage for the independent intervening act. The accepted test of causation is whether or not reasonable men would have been expected to anticipate the intervening act. Here defendant could not have anticipated that decedent would ignore the repeated warnings of the presence of the hot box and twice refuse the request of the conductor that he get a new locomotive. Such wanton and defiant misconduct of the decedent, in total disregard of his own safety and that of his crew and passengers, was so deliberate and unanticipated as to break whatever chain of causation might otherwise have existed between the employer's alleged failure to furnish a safe locomotive and the derailment which caused decedent's death. The employer had no control over decedent's arbitrary conduct while he was in sole charge of the employer's property. The phrase of the statute, "resulting in whole or in part", does not free an employee from all responsibility for his own conduct and place upon the employer an absolute liability for whatever happens. (*Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 141.) This primary duty rule cannot be applied as a matter of law, but it is for the jury to determine under all the facts whether or not the willful misconduct of the decedent in the handling of his locomotive was the sole proximate cause of his injury, when he was in complete control and could have taken the locomotive out of service when he found it was defective.

Certainly the Court of Appeals in no event was justified in assuming that the jury in the case at bar did not

find from the undisputed facts that decedent's flagrant disregard of the warnings of others and of his own knowledge of the danger was the sole proximate cause of his death, and in holding as a matter of law that the jury could not so find from the evidence. Following the reasoning of the Court of Appeals, an engineer could deliberately run his engine into a river after a washout and commit suicide and the railroad would be liable to his personal representative because it did not maintain a safe track.

The Court of Appeals has substituted its opinion as to the proximate cause of the derailment, which resulted in decedent's death, for that of the jury, and by its holding denies to the defendant the right of trial by jury on this question, contrary to repeated decisions of this Court and other courts of appeals.

Lavender v. *Kurn*, 327 U. S. 645, 653;

Blair v. *B. & O. R. Co.*, 323 U. S. 600, 602;

Tennant v. *P. & P. U. Ry. Co.*, 321 U. S. 29, 35;

Bailey v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 353;

Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481, 491;

B. & M. R. Co. v. *Cabana*, (C. C. A. 1) 148 Fed. (2nd) 150, 152;

Barry v. *Reading Co.*, (C. C. A. 3) 147 Fed. (2nd) 129, 130;

Pratt v. *L. & A. Ry. Co.*, (C. C. A. 5) 135 Fed. (2nd) 692;

McGivern v. *N. P. Ry. Co.*, (C. C. A. 8) 132 Fed. (2nd) 213, 219.

IV.

The Court of Appeals erred in holding that the Safety Appliance Act and the Employers' Liability Act, considered in pari materia, are to be judicially construed as a workmen's compensation act, relieving the employee or his personal representative from the burden of proving that an alleged violation of the Safety Appliance Act was the proximate cause of the injury or death of the employee, thereby making the employer an insurer of the safety of its employee.

The Court of Appeals for the Seventh Circuit, in the opinion now before this Court written by Judge Minton, does not say in words that the Safety Appliance Act and the Employers' Liability Act should be judicially construed as a workmen's compensation act, as did Judge Major in the opinion in *Griswold* v. *Gardner,* (C. C. A. 7) 155 Fed. (2nd) 333, but the effect of the instant decision is that the employer is deprived of a jury determination of whether it is guilty of negligence and whether its negligence, including a violation of the Safety Appliance Act, is a proximate cause of the injury of the employee.

Even if these acts could be construed as a workmen's compensation act, that would not eliminate the defense that the injury was caused by the deliberate act of the employee. The Federal Employees' Compensation Act (5 U. S. Code, Sec. 751, 39 U. S. Stat. 742) provides that "no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee". This legislative declaration of public policy is in line with the rule of judicial decisions that an employee cannot recover for injuries resulting solely from his own misconduct and that an employer is liable only when his wrongful act is a proximate cause of the injury.

The construction by the Court of Appeals of the Acts under which plaintiff sues is contradictory of the language of the Acts. By their very terms the Acts make negligence the basis of liability and it is elementary that there is no liability, even where there is negligence, unless the negligence is the proximate cause of the injury. The instant decision is directly contrary to the decision of the same Court in *Edwards* v. *B. & O. R. Co.*, 131 Fed. (2nd) 366, 368, where the Court in an opinion by Judge Lindley, Judges Major and Minton concurring, holds that the mere happening of an accident is not sufficient to fix liability and that no recovery can be had without negligence on the part of the carrier or one of its employees. These conflicting decisions in the Seventh Circuit create uncertainty and confusion that should not be permitted to continue.

The Court of Appeals for the Third Circuit has held squarely that these acts cannot be judicially construed as a workmen's compensation act (*Mastrandrea* v. *Pennsylvania R. Co.*, 132 Fed. (2nd) 318, 319; *Barry* v. *Reading Co.*, 147 Fed. (2nd) 129, 130), and the rule in all of the circuits, except the Seventh, is that there still remains to the employer under the Employers' Liability Act the defense that a violation of the Safety Appliance Act is not the proximate cause of the injury and that, where the evidence on this point is of such a character that different inferences may be drawn, it is the province of the jury to draw the inference and that the court cannot substitute its judgment for the judgment of the jury where there is any evidence to support the jury's verdict.

This Court, in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, stated the rule applied by the Federal courts in the following language (p. 354):

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurispru-

dence'. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The rule here applied to preserve the sanctity of a jury's verdict for the plaintiff must be applied with the same purpose and effect to preserve the sanctity of the jury's verdict for the defendant. The decision here sought to be reviewed holds that it is for the Court to determine as a matter of law that a defect in a locomotive in use is a proximate cause of an injury to any employee, including the engineer in charge of the locomotive, while the locomotive is in use, and is in direct conflict with the principle stated by this Court in the *Bailey* case and in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, and, as far as we are advised, all other decisions of this Court construing the Act.

CONCLUSION.

We submit that this case comes squarely within the principle of Rule 38-5(b). The Circuit Court of Appeals for the Seventh Circuit has in this case rendered a decision in conflict with the decisions of other courts of appeals and in conflict with applicable decisions of this Court, and it has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision. It is important to common carriers by railroad of this country, the thousands of railroad employees and their next of kin, and the public, that the uncertainty and confusion created by the decision here sought to be reviewed be settled by this Court.

Respectfully submitted,

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